No. S167791
(Court of Appeals No. C054124)
(Yolo County Super. Ct. No. CV052064)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT MARTINEZ, *et al.,*
Plaintiffs-Appellants,
vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.,*
Defendants-Respondents.

After a Decision by the Court of Appeal,
Third Appellate District

BRIEF OF U.S. REPRESENTATIVE LAMAR SMITH, U.S. REPRESENTATIVE STEVE KING, WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* SUPPORTING APPELLANTS

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ISSUES PRESENTED FOR REVIEW

Amici curiae address the following issue only:

Have Appellants stated a cause of action upon which relief can be granted in asserting that California EDUCATION CODE § 68130.5 is preempted by 8 U.S.C. § 1623, which prohibits a State from providing in-state college tuition rates to illegal aliens living within the State unless the State also offers those in-state rates to U.S. citizens (such as Appellants) who are not domiciliary residents of California?

INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* are more fully set forth in the application for leave to file, accompanying this brief.

U.S. Representative Lamar Smith (Tex.) is the Ranking Member of the House Judiciary Committee and the former Chairman of its Immigration, Citizenship, Refugees, Border Security, and International Law Subcommittee. In 1996, he played a leading role in adoption of 8 U.S.C. § 1623 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546. Rep. Smith has been a leading proponent of efforts to ensure that illegal immigrants are not afforded more access, than U.S. citizens, to taxpayer subsidized education.

U.S. Representative Steve King (Iowa) is a Member of the House

Judiciary Committee and the Ranking Member of its Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law. He is a sponsor of pending legislation designed to reduce incentives for aliens to enter the United States illegally.

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with members and supporters in all 50 States. WLF's members include United States citizens who are not California residents and who attend or are interested in attending (or whose dependent children attend or are interested in attending) public postsecondary education institutions within the State of California. WLF devotes a significant portion of its resources to protecting the constitutional and civil rights of American citizens and aliens lawfully in this country. *See, e.g., Podberesky v. Kirwan* (4th Cir. 1994) 38 F.3d 147 (successful challenge to university's denial of scholarship benefits to Hispanic student on account of race), *cert. denied* (1995) 514 U.S. 1128. In 2005, WLF filed complaints with the U.S. Department of Homeland Security (DHS), challenging policies in force in the States of New York and Texas that favor illegal aliens over U.S. citizens in the award of in-state tuition rates at colleges and universities. DHS has not yet responded to those petitions. WLF also participated in

litigation that challenged a similar policy adopted by the State of Kansas. *Day v. Bond* (10th Cir. 2007) 500 F.3d 1127, *cert. denied* (2008) 128 S. Ct. 2987.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in State and federal courts on civil rights issues on a number of occasions.

Amici are concerned that California has adopted a policy that discriminates against U.S. citizens in favor of aliens who are in this country illegally and are not domiciliary residents of California. *Amici* are also concerned that the U.S. Department of Homeland Security is not currently taking steps to enforce the federal statute that expressly prohibits such discrimination. In light of that inaction, *amici* believe that it is particularly important for this Court to address the merits of Appellants' claims. While *amici* believe that Appellants have pleaded valid causes of action under the Equal Protection Clause and the Privileges and Immunity Clause of the Fourteenth Amendment to the U.S. Constitution and with respect to preemption under 8 U.S.C. § 1621, *amici*'s sole focus in this brief is Appellants' claims with respect to 8 U.S.C. § 1623.

STATEMENT OF THE CASE

The case comes before the Court on review of the trial court's grant of a demurrer filed by Defendants-Appellees (referred to herein collectively as "the Universities"). Accordingly, the Court treats the demurrer "as admitting all properly pleaded facts." *Shirk v. Vista Unified School Dist.* (2007) 42 Cal. 4th 201, 205. The factual allegations included in the complaint filed by Plaintiffs/Appellants "must [be] assume[d] to be true." *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal. 4th 797, 810.

Institutions of higher education operated by the State of California offer reduced tuition rates to some of their students. In general, the reduced rates are available only to those who are domiciliary residents of the State. *See, e.g.,* EDUC. CODE §§ 68040, 68050, 68052. As the Universities concede, those who are physically present in California in violation of federal immigration laws (referred to herein as "illegal aliens") are not domiciliary residents of the State and thus historically have not been eligible for in-state tuition rates. *See, e.g.,* CCC Opening Br. at 4 (citing EDUC. CODE § 68062(h)).

Appellants allege that the California legislature thereafter adopted legislation "intended" to permit illegal aliens living within the State to enroll in California colleges and universities at in-state tuition rates, while

denying those same reduced rates (in the vast majority of cases) to U.S. citizens who are not domiciliary residents of California. Complaint, ¶ 5. Appellants allege that the legislation (codified at EDUC. CODE § 68130.5) violates 8 U.S.C. § 1623, which prohibits States from offering in-state tuition to illegal aliens "on the basis of residence," unless the same rates are also offered to all U.S. citizens.[1]

Appellants are U.S. citizens who attend or have attended colleges or universities in California and (because they are not domiciliary residents of California) have been paying tuition at higher, out-of-state rates. Their complaint sought declaratory, injunctive, and monetary relief based on claims that § 68130.5: (1) violated their rights under § 1623 (Count I); (2) violated their rights under 42 U.S.C. § 1983, which creates a federal right of action against those who, acting under color of state law, deprive another of rights protected by a federal law – in this instance § 1623

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[1] 8 U.S.C. § 1623 provides in pertinent part:

> Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

(Count III); and (3) violated their rights under federal law because it is both expressly and impliedly preempted by § 1623 and other provisions of federal law (Count VI).

The trial court granted the Universities' demurrer with respect to all ten counts of the complaint, without leave to amend. In an 84-page opinion issued in September 2008, the Court of Appeal reversed in significant part. It held that Appellants had not adequately preserved their appeal with respect to Counts I and III and on that basis upheld the demurrer as to those two counts. Opn. at 17-23. The appeals court held that Appellants were nonetheless entitled to raise their § 1623 claim by means of their assertion (in Count VI) that § 68130.5 was expressly and impliedly preempted by § 1623 and other provisions of federal law. Opn. at 33-72. The court reversed the judgment and remanded, stating, "[T]he demurrer was improperly sustained as to the preemption claims." Opn. at 83-84.

SUMMARY OF ARGUMENT

The Court of Appeal properly determined that Appellants should be afforded an opportunity to prove their claim that California established a statutory scheme whose intent and effect is to favor illegal aliens who reside in California over nonresident U.S. citizens with respect to the

award of reduced tuition rates at public colleges and universities. That scheme is both expressly and impliedly preempted by 8 U.S.C. § 1623 as well as by other provisions of federal law.

The Universities' claims to the contrary are based on a misinterpretation of the terms of §1623. They argue that any favoritism shown to illegal aliens over U.S. citizens could not possibly be "on the basis of residence" because the State's statutory scheme continues to make clear that illegal aliens are not to be deemed "residents" for tuition purposes. *See, e.g.,* CCC Opening Br. at 10. That argument conflates two distinct definitions of the term "residence": (1) the abode in which one is physically present; and (2) the location of one's domicile, that is, the location at which one intends (and is entitled) to remain for the foreseeable future. The Universities are correct that California does not purport to confer domiciliary resident status on illegal aliens who are physically present in the State, and thus they are not being favored over U.S. citizens based on an assertion that California is their place of domicile. But when Congress prohibited discrimination on the basis of "residence," it was using the term in the sense that a State may not discriminate in favor of illegal aliens on the basis that they are and have been *physically present* in the State. The complaint alleges that California has discriminated against

Appellants in just that fashion.

The Universities also contend that their discrimination against Appellants should not be deemed "on the basis of residence" because the criteria established by § 68130.5 in order to qualify for reduced tuition do not mention the words "resident" or "residence." But the decision of California legislators to craft a statute that omits those magic words should not preclude Appellants from being permitted to prove their allegation that the legislature intended to discriminate on the basis of physical presence in the State. Indeed, the briefs filed by the parties serve merely to confirm the appeals court's conclusion that the criteria ultimately adopted by the legislature to define eligibility under § 68130.5 (*e.g.,* high school attendance and graduation) were designed to serve as surrogates for residency. That conclusion is not undermined merely because the Universities can point to a small handful of U.S. citizens (not including any of the Appellants) who qualify for reduced tuition under § 68130.5.

Finally, the Court of Appeal was correct that Appellants are entitled to bring suit for this alleged violation of federal immigration law. Even the trial court recognized that Appellants have standing to sue (based on the injury suffered by virtue of being forced to pay higher tuition), and the Universities do not contend otherwise. The trial court ruled that § 1623

does not create a direct private right of action, and the Court of Appeal ruled that Appellants did not properly preserve that issue on appeal. But the Court of Appeal also ruled that Appellants *are* permitted to invoke § 1623 in support of their claim that the California scheme is expressly and impliedly preempted. There were several permissible routes by which the appeals court could have reached its conclusion that Appellants should have their day in court, and the route that court chose is wholly unobjectionable. The fact that Appellants' non-constitutional case is now proceeding largely as a preemption claim may have some bearing on the types of relief to which Appellants ultimately may be entitled, but it does not diminish Appellants' right to survive a demurrer.

ARGUMENT

I. SECTION 68130.5 FAVORS ILLEGAL ALIENS OVER U.S. CITIZENS "ON THE BASIS OF RESIDENCE" IN ITS BESTOWAL OF REDUCED TUITION RATES AND THUS IS EXPRESSLY PREEMPTED BY § 1623

In the event of a conflict between California law and federal law, the Supremacy Clause of the U.S. Constitution, Art. vi, cl.2, mandates that federal law must prevail. Therefore, § 68130.5 is expressly preempted by 8 U.S.C. § 1623 if the California statute authorizes the sort of tuition policy that § 1623 expressly forbids. At the very least, Appellants have stated a plausible claim that the reduced tuition rates authorized by

§ 68130.5 fall within the category that Congress expressly prohibited.

Section 68130.5(a) provides that an individual (other than a "nonimmigrant alien")[2] enrolled at a California college or university is entitled to reduced, in-state tuition rates, notwithstanding that the individual is not a domiciliary resident of California, if he or she meets all of the following criteria:

> (1) High school attendance in California for three or more years.
>
> (2) Graduation from a California high school or attainment of the equivalent thereof.
>
> (3) Registration as an entering student at, or current enrollment at, an accredited institution of higher learning in California not earlier than the fall semester or quarter of the 2001-2002 academic year.
>
> (4) In the case of a person without lawful immigration status, the filing of an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so.

The disparate impact that the statute has on U.S. citizens living outside California is self-evident. The vast majority of such nonresident

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[2] In general, the term "nonimmigrant alien" encompasses individuals lawfully admitted to the United States on a temporary basis as a student or visitor. 8 U.S.C. § 1101(a)(15). Illegal immigrants are not "nonimmigrant aliens" because they have not been lawfully admitted into the country. In other words, § 68130.5 favors illegal aliens over a category of aliens who are lawfully present in this country.

U.S. citizens do not attend or graduate from a California high school and thus do not qualify for reduced tuition. On the other hand, virtually all college-bound illegal aliens who have been physically present in California during their teenage years do qualify because they have attended and graduated from a California high school. Accordingly, in determining whether § 68130.5 violates the mandate of § 1623, the central question is whether § 68130.5's discrimination in favor of illegal aliens constitutes discrimination "on the basis of residence."

A. The Phrase "On the Basis of Residence" Refers to Physical Presence in a State, Not to Domiciliary Residence

All parties agree that illegal aliens living in California are not domiciliary residents of the State. No matter how long they have lived in California, they cannot establish domicile because they are not legally entitled to remain in the State. The Universities note that in adopting §68130.5, the California legislature was careful to make clear that the new law did not purport to confer domiciliary resident status on illegal aliens; it merely "exempt[ed]" illegal aliens from paying nonresident tuition if they could meet the four criteria set forth in § 68130.5.[3] The Universities argue

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[3] Moreover, the legislature left in place §68062(h), which prohibits those aliens who are forbidden by federal law from establishing domicile in the United States (*i.e.,* illegal aliens) from establishing a "residence" in

that because California does not consider illegal aliens living in the State to be "residents" for tuition purposes, any discrimination in favor of those illegal aliens could not possibly qualify as discrimination "on the basis of residence" within the meaning of § 1623. *See,* CCC Opening Br. at 10.

That argument is based on a misunderstanding of Congress's intent in using the phrase "on the basis of residence." Congress could not possibly have intended to mean "on the basis of *domiciliary* residence." That interpretation would render § 1623 meaningless because no illegal aliens are domiciled in this country, and it obviously would not be possible for a State to discriminate in favor of a non-existent group: illegal aliens who are domiciled within the State.

The word "residence," as used in the immigration laws, has been explicitly defined by Congress in a different sense – the location at which one habitually stays, rather than one's domicile. *See* 8 U.S.C. § 1101(a)(33) ("The term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.").[4] Thus, the plain language of

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California for purposes of obtaining in-state tuition rates.

[4] In 1996, when it adopted § 1623 and other restrictions on the provision of public benefit to illegal aliens, Congress explicitly stated that the definitions contained in 8 U.S.C. § 1101(a) were applicable to the

§ 1623 prohibits a State from favoring illegal aliens over nonresident U.S. citizens in the award of in-state tuition rates, if the reason for doing so is that those receiving the favor are and have been physically present within the State. That is precisely what Appellants allege the California legislature intended to do when it adopted § 68130.5. Appellants therefore have adequately alleged that California, in adopting § 68130.5, has adopted a policy expressly prohibited by 8 U.S.C. § 1623.

B. Appellants Have Plausibly Alleged That § 68130.5's High School Graduation/Attendance Requirements Are Mere Surrogates for Residency

The Universities note that neither the word "resident" nor the word "residence" is included in § 68130.5, and that it is possible for some U.S. citizens to qualify for in-state tuition under that statute even if they are not domiciliary residents of California. Based on those features of the statute, they assert that illegal aliens who qualify for in-state tuition under § 68130.5 should not be deemed to do so "on the basis of residence," within the meaning of § 1623.

The Universities are free to make that argument at trial, but will have an exceedingly difficult time explaining what motivated the legislature to adopt § 68130.5, if it was not a desire to benefit those who

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statutory provisions containing those restrictions. *See* 8 U.S.C. § 1641(a).

were physically present in the State before enrolling in college. Their argument is inappropriate at the demurrer stage, however, when the properly pleaded factual allegations of Appellants' complaint must be assumed to be true. *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th at 810. Appellants have alleged that § 68130.5 was adopted for the purpose of favoring illegal aliens living in California over nonresident U.S. citizens with respect to tuition rates at California colleges and universities, and that the high school graduation/attendance requirements were inserted into § 68130.5 as a surrogate for residency. If the surrogacy allegation is proven at trial, there can be little doubt that § 68130.5 violates the express command of (and thus is expressly preempted by) § 1623.

Moreover, the Court of Appeal's discussion of the issue demonstrates that the evidence to date overwhelmingly supports Appellants' view of the statute. That evidence includes: (1) the vast majority of those who benefit from § 68130.5 are illegal aliens; and (2) the legislative history of the statute indicates that legislators were searching for a way to benefit illegal aliens while evading the prohibition imposed by § 1623. The legislature's omission of the word "residence" from § 68130.5 is of little relevance. As the Court of Appeals stated, "[T]he question is whether the statute confers a benefit on the basis of residence, not whether the statute

admits such a benefit is being conferred." Opn. at 47.

Section 68130.5 imposes four conditions that must be met before someone who is not a domiciliary resident of California can quality for tuition at in-state rates. But the only substantial requirement is the first one: enrollment for at least three years in a California high school.[5] One would be hard-pressed to come up with a better proxy for California residency (in the sense of physical presence within the State) than attendance at a California high school for three years. There undoubtedly are some individuals who meet the high school attendance requirement but who have never lived in California (e.g., students living in Mexico or an adjoining State who paid to be permitted to attend a California high school). Conversely, there may also be a few individuals seeking to enroll in a California college who are physically present in the State but do not

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[5] Section 68130.5 also requires those seeking in-state rates: (1) to enroll in an institution of higher learning not earlier than the fall of 2001; and (2) if the student is an illegal alien, to submit an affidavit promising to apply for legalized status if the student ever becomes eligible for such status. As the appeals court concluded, "[T]hese supposed requirements add nothing." Opn. at 48. Enrollment is necessarily a prerequisite to having to pay tuition at all, and the affidavit is "an empty, unenforceable promise contingent upon some future eligibility that may or may not ever occur." *Id.* A third condition of eligibility – attaining a California high school diploma or its equivalent – adds little, because students generally are not eligible to enroll in a California college or university until they have acquired a high school diploma. *Id.*

qualify as domiciliary residents and who did not attend a California high school (*e.g.,* illegal aliens who moved to California after having attended high school elsewhere). But as the Court of Appeal concluded, it is "reasonable" to conclude that the set of college-bound individuals who attended a California high school (but are not California domiciliaries) correlates very closely with the set of those college-bound individuals who have been living in California (but who are not California domiciliaries). Opn. at 49. At the very least, the close correlation between those two groups raises a reasonable suspicion that the California legislature adopted the high school attendance/graduation requirement intending that it serve as a surrogate for residency (in the sense of physical presence) in the State.

That suspicion grows when one considers that the vast majority of those who benefit from § 68130.5 are illegal aliens who live in California. If figures cited in the brief of the Board of Governors of the California Community Colleges are accurate, more than 90% of those eligible to benefit from § 68130.5 are illegal aliens who live in California. CCC Opening Br. at 11-12. The Court of Appeal cited similar figures. Opn. at 52-53. Moreover, it is uncontested that in excess of 99.9% of nonresident U.S. citizens cannot qualify for in-state tuition rates under the statute. While the Universities will be free to argue at trial that this overwhelming

disparate impact was not intended by the California legislature and its sole intent was to benefit California high school graduates (who just happened, in the vast majority of circumstances, to reside in California),[6] the inference created by these skewed numbers – that the California legislature intended to benefit illegal aliens on the basis of their residence in the State – is more than sufficient to sustain the Court of Appeal's decision to reverse the trial court's grant of a demurrer.

The case law provides no support for the Universities' contention that the absence of the words "resident" and "residence" in § 68130.5 immunizes the statute from challenge under § 1623. The U.S. Supreme Court's treatment of "grandfather clauses" is illustrative. Following the Civil War and the adoption of the Fifteenth Amendment, southern States adopted a series of measures designed to prevent blacks from voting. Among such measures were strict literacy tests that few could pass; but the

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[6] It seems reasonable to infer that § 1623 includes some sort of intent requirement. The statute provides that, when deciding who is entitled to in-state tuition rates, a State may not discriminate in favor of illegal aliens and against U.S. citizens "on the basis of residence." The "on the basis of" language suggests that the statute's prohibition is limited to situations in which a State intends the predictable consequences of its policies and intends to favor those living in the State over U.S. citizens not living in the State "at least in part because of, not merely in spite of" their residency. *Personnel Administrator of Massachusetts v. Feeney* (1979) 442 U.S. 256, 279.

literacy tests invariably included a "grandfather clause" designed to ensure that whites who could not pass would still be permitted to vote. For example, Oklahoma adopted a strict literacy test in 1910, but added the following provision: "[N]o person who was, on January 1st, 1866, or any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote" because of failure to pass the literacy test.

In response to a challenge to the provision, Oklahoma insisted that it did not violate the Fifteenth Amendment because the provision contained no language purporting to limit the right to vote on the basis of "race, color, or previous condition of servitude." U.S. Const., Amend. xv, § 1. The U.S. Supreme Court unanimously rejected that argument in light of evidence that the provision rested "upon no discernable reason other than the purpose to disregard the provisions of the [Fifteenth] Amendment." *Guinn v. United States* (1915) 238 U.S. 347, 363. The Court explained:

> It is true that [the Oklahoma provision] contains no express words of an exclusion from the standard which it establishes of any person on account of race, color, or previous condition of servitude, prohibited by the 15th Amendment, but the standard itself inherently brings that result into existence since it is based purely upon a period of time before the enactment of the 15th Amendment, and

> makes that period the controlling and dominant test of the right of suffrage. . . . [W]e are unable to discover how, unless the prohibition of the 15th Amendment were considered, the slightest reason was afforded for basing the classification upon a period of time prior to the 15th Amendment.

Id. at 364-65. Similarly, the California legislature's careful exclusion of the words "resident" and "residence" from § 68130.5 does not immunize the statute from challenge if, as alleged by Appellants, the statute was designed for the purpose of favoring illegal aliens living in the State over nonresident U.S. citizens.[7]

More recently, the Court invoked the Fifteenth Amendment to strike down a Hawaii statute that limited voting in certain special elections to those descended from individuals who were present on the islands before 1778, even though no language in the statute purported to limit voting on the basis of race. *Rice v. Cayetano* (2000) 528 U.S. 495. The Court also rejected Hawaii's argument that the statute could not be deemed race-based because a handful of Polynesians living in Hawaii were

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[7] Nor did the Supreme Court in *Guinn* attach any significance to the fact that the Oklahoma provision did not correlate 100% to a prohibition of voting by blacks (*e.g.*, a few blacks could qualify under the "grandfather clause" because they could demonstrate that at least one direct ancestor was entitled to vote in 1866). For similar reasons, it is immaterial to Appellants' claims that a handful of nonresident U.S. citizens can qualify for in-state tuition rates under § 68130.5.

ineligible to vote (their ancestors had migrated to Hawaii from other Pacific islands *after* 1778), explaining, "Simply because a class defined by ancestry does not include all members of the race, does not suffice to make it race neutral." *Id.* at 516-17. Just as "[a]ncestry can be a proxy for race," *id.* at 514, so too enrollment in a California high school can be a proxy for residence/physical presence in California.

C. The Legislative History of § 68130.5 Considerably Strengthens Appellants' Allegation That the Statute Was Adopted to Benefit Illegal Aliens "On the Basis of Residence"

The legislative history leading up to adoption of § 68130.5 dispels any serious doubt that the statute was adopted for the purpose of benefitting illegal aliens "on the basis of residence."

Perhaps most striking are the legislative findings made by the California legislature at the time that it adopted §68130.5. Those findings do not indicate an especial interest in advancing the education of those – regardless of place of abode – who have graduated from California high schools. Rather, the findings express an interest in advancing the education of *those who have been living in the State*: "There are high school pupils who have attended elementary and secondary schools in this state for most of their lives and who are likely to remain, but are precluded from obtaining an affordable college education because they are required

to pay nonresident tuition fees." Calif. Stats. 2001 ch 814 § 1(a)(1). The only individuals meeting that description are illegal aliens who have grown up in California.[8]

The Higher Education Committee Analysis of Assembly Bill No. 540 (which became §68130.5) is similarly illuminating. It summarized the bill as follows: "Qualifies long-term California *residents*, as specified, regardless of citizenship status, for lower 'resident' fee payments at the [CCC] and the [CSU]." Concurrence in Sen. Amends., Assem. Bill No. 540 (2001-2002 Reg. Sess.) as amended Sept. 7. 2001, p.1 (emphasis added). The use of the phrase "residents . . . regardless of citizenship status" to describe the beneficiaries of the bill is a clear indication that the legislature understood that the bill was intended to provide financial

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[8] The legislative finding could not be referring to students who have lived in bordering states but who attended public schools in California by special permission of the State. Such students are not "precluded from obtaining an affordable college education because they are required to pay nonresident tuition rates" – they could attend college at reduced rates by attending college in their home states. Moreover, as the Court of Appeal pointed out, it is simply not credible to suggest that the California legislature was acting out of solicitude for the financial well-being of such bordering-state students, given that California law required such students to pay stiff tuition fees throughout the years they attended public schools in California. Opn. at 51 ("Defendants ask us to believe that the Legislature enacted section 68130.5 to subsidize the college education of students who were not entitled to free or subsidized education in California's elementary/secondary schools. That makes no sense.").

assistance to illegal aliens "on the basis of residence."

Finally, as the Court of Appeal recounted, Governor Gray Davis vetoed a prior bill that was in essence identical to §68130.5, on the grounds that the prior bill would have violated § 1623 because its professed intent was to benefit illegal aliens living in the State. Opn. at 59-60. The legislature's response was to tack findings onto the new (largely unchanged) bill, declaring that its new intent was to benefit those (whether nonresident U.S. citizens or illegal aliens) who attended and graduated from California high schools, and not to "confer postsecondary education benefits on the basis of residence within the meaning of" § 1623. *Id.* at 54. That sequence of events strongly supports Appellants' view of the case: § 68130.5 was not motivated by a newly discovered desire to provide benefits to those who attended high school in California (without regard to where they lived while in high school) but rather by a desire to repackage the legislature's previously announced goal (to assist illegal aliens living in the State) in a manner that would evade the proscriptions of § 1623.

D. § 68130.5 Is Expressly and Impliedly Preempted by Federal Immigration Law, Including § 1623

Given that (as demonstrated above) § 68130.5 adopts a policy that is expressly prohibited by § 1623, it follows that § 68130.5 should be

deemed expressly preempted by § 1623. It is beyond dispute that when Congress chooses to preempt state and local law (particularly where, as here, the law affects federal immigration policy), it is entitled to do so under the Supremacy Clause. U.S. Const., Art. vi, cl. 2.

The Universities contend that a "presumption against preemption" should somehow operate to save § 68130.5 from invalidation. CCC Opening Br. at 22. But any such presumption is merely a tool to assist in deciding the ultimate issue in a preemption case: did Congress intend to prevent State and local governments from exercising authority over an issue of concern to the federal government? As the U.S. Supreme Court has repeatedly emphasized, "Preemption fundamentally is a question of congressional intent." *English v. General Electric Co.* (1990) 496 U.S. 72, 78-79. When Congress's purpose is obscure, a presumption against preemption is a rule of construction used to resolve ambiguities. But there is nothing ambiguous about § 1623: it flatly prohibits States from offering in-state tuition to illegal aliens "on the basis of residence" while denying those same rates to nonresident U.S. citizens. Appellants have alleged that the Universities are offering in-state tuition to illegal aliens living in California while denying nonresident U.S. citizens those same rates; if the allegations are borne out at trial, Congress's intent to preempt the

California policy is clear from the face of the statute. The Universities have not pointed to any alleged ambiguities in § 1623. Their only defense is that the California legislature did not intend to benefit illegal aliens "on the basis of residence," not that the meaning of "on the basis of residence" is ambiguous and that the Court should adopt their proffered meaning. Accordingly, any reliance on a "presumption against preemption" would be misplaced in this case.

Section 68130.5 is also *impliedly* preempted by federal immigration law. A state law is deemed to be impliedly preempted when, *inter alia,* "a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Wisconsin Public Intervenor v. Mortier* (1991) 501 U.S. 597, 605. As exemplified by § 1623 and similar federal immigration statutes, Congress's "purposes and objectives" include preventing illegal immigrants from receiving public benefits – both to discourage them from remaining in this country and to eliminate incentives that might cause other aliens to seek to enter the United States illegally.[9] By offering in-state tuition rates to illegal aliens "on the basis of

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[9] *See, e.g.,* 8 U.S.C. § 1601(6) ("It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits."). *See also* 8 U.S.C. §§ 1611, 1621.

residence" – in direct violation of § 1623's mandate – California is undercutting those purposes and objectives. Accordingly, § 68130.5 is impliedly preempted because it conflicts with the purposes of § 1623 and similar federal immigration statutes. *See Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137 (holding that courts are precluded from awarding damages to illegal aliens when the effects of such awards would be to undercut immigration policy by encouraging aliens to come to this Nation illegally and/or to stay here without authorization).

II. APPELLANTS ARE AUTHORIZED TO BRING SUIT FOR THIS ALLEGED VIOLATION OF FEDERAL IMMIGRATION LAW

The petition for review filed by the Board of Governors of the California Community Colleges, *et al.*, raised the following question regarding preemption: Do federal immigration laws preempt California's policy of granting in-state tuition to nonresident high school graduates? The petition for review filed by the Regents of the University of California, *et al.,* raised the following questions regarding preemption: (1) whether EDUC. CODE § 68130.5 is preempted by 8 U.S.C. § 1621; and (2) whether EDUC. CODE § 68130.5 is preempted by 8 U.S.C. § 1623. Accordingly, this case does not raise the issue of whether Appellants are authorized by federal law to maintain a private action raising preemption

claims, and neither of the briefs filed by the Universities argues that the preemption claims are not authorized.

Nonetheless, out of an abundance of caution, *amici* address the issue of Appellants' right to proceed on the preemption claims. Appellants invoked § 1623 in connection with three of their claims: Count I (a claim seeking a private right of action to directly enforce § 1623); Count III (a claim under 42 U.S.C. § 1983, asserting a deprivation of their rights protected by federal laws, including § 1623); and Count VI (a claim that § 68130.5 is expressly and impliedly preempted by federal immigration law, including § 1623). The trial court granted the Universities' demurrer with respect to all claims. Its dismissal of Counts I and III was based in part on a finding that Congress had not intended to permit private enforcement of § 1623. The Court of Appeal declined to review the dismissal of Counts I and III, finding that Appellants had waived the right to appeal those issues by failing to raise them sufficiently clearly in their opening brief. Opn. at 18-23. But the Court of Appeal determined that Appellants had taken sufficient steps to appeal dismissal of the preemption claims, and it held both that Appellants were entitled to sue to enforce federal preemption and that Appellants' preemption claims stated claims upon which relief could be granted. Opn. at 37, 67. The appeals court

explained that the lack of a private right of action to enforce § 1623 directly does not preclude recognition of a preemption claim. Opn. at 22 (citing *Qwest Corp. v. City of Santa Fe* (10th Cir. 2004) 380 F.3d 1258, 1266; *Western Air Lines, Inc. v. Port Authority of New York and New Jersey* (2d Cir. 1987) 817 F.2d 222, 225. By failing to contest that holding either in their petitions for review or in their opening briefs, the Universities have waived any right to challenge that holding in these proceedings.

Even putting aside the issue of waiver, *amici* can see no basis for finding fault in the appeals court's ruling. No doctrine of federal law precludes private individuals from going into federal court to assert a claim that the injuries they suffered were caused by state laws that are invalid because they are preempted by federal law. The fact that a plaintiff is proceeding on a preemption claim may have some bearing on the types of relief to which the plaintiff may be entitled, but it does not diminish the plaintiff's right to survive a demurrer.

Should this Court, despite the Universities' waiver of the issue, decide to re-open the issue of Appellants' right to sue to enforce federal preemption, then fairness dictates that all other issues regarding rights of action should be re-opened as well, including Appellants' right of action to

enforce § 1623 directly (Count I) and their right of action to enforce § 1623 under 28 U.S.C. § 1983 (Count III). *Amici* submit that the trial court erred in determining that Appellants lacked private rights of action under Counts I and III.

Section 1623 provides that if a State makes illegal aliens eligible for in-state tuition rates on the basis of residence, it must make *all* citizens of the United States so eligible, regardless of their State of residency. Like the vast majority of federal statutes, § 1623 does not state explicitly whether it is privately enforceable by U.S. citizens denied in-state tuition rates in violation of the statute. Nonetheless, an examination of the statutory language and the context of its adoption make reasonably clear that Congress intended to permit private enforcement.

The Supreme Court has identified four factors that can be "indicative" of "whether Congress intended to make a remedy available to a special class of litigants." *Cannon v. University of Chicago* (1979) 441 U.S. 677, 688. The factor invariably cited first: "'[I]s the plaintiff one of the class for whose especial benefit the statute was enacted.'" *Id.* at 688 n.9 (quoting *Cort v. Ash* (1975) 422 U.S. 66, 78).[10] As *Cannon* explained,

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[10] Other factors identified by the Court as bearing on the issue of congressional intent include: is there any indication of legislative intent,

there is reason to infer that Congress intended to create a private right of action by individuals in the class for whose especial benefit the statute was enacted, but courts should be "especially reluctant to imply causes of action under statutes that create duties on the part of persons for the benefit of the public at large." *Id.* at 693 n.13.

The most logical reading of 8 U.S.C. § 1623 is that it was adopted for the benefit, not of the public at large, but of a discrete, limited group: U.S. citizens who seek to attend public universities outside the State in which they are domiciled. The statute imposes but one condition on State governments: they are free to offer to illegal aliens whatever tuition discounts they wish to offer, but any such offers based on the illegal aliens' residence must also be extended to U.S. citizens living outside the State. The statute cannot reasonably be viewed as one designed to protect the public at large because although the public at large may well have an interest in limiting the use of public funds to subsidize the higher education of those who are in this country illegally, § 1623 imposes no absolute limitation of that nature. The statute's function is to ensure that a

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explicit or implicit, either to create such a remedy or to deny one?; is it consistent with the legislative scheme to imply such a remedy for the plaintiff?; and is the cause of action one traditionally relegated to state law, in an area basically of concern to the States, so that it would be inappropriate to infer a cause of action based solely on federal law? *Id.*

State does not treat U.S. citizens less favorably than illegal aliens with respect to tuition rates. Because § 1623 was intended for the especial benefit of a relatively small class of individuals of which Appellants are members, it is reasonable to infer that Congress intended to create a private right of action to enforce § 1623 by those U.S. citizens – such as Appellants – who allege that they have been injured by a State's violation of § 1623.

Perhaps the strongest indication that Congress intended to permit private enforcement of § 1623 is its *express* indication of such an intent in 42 U.S.C. § 1983. Section 1983 provides a right of action against any person who, under color of State law, deprives others of any "rights, privileges, or immunities secured by the Constitution and laws." There can be no dispute that California officials, when adopting and enforcing the policies underlying § 68130.5, were acting under color of state law. Furthermore, the U.S. Supreme Court has made clear that the phrase "Constitution and laws," as used in § 1983, encompasses *all* federal statutes, including 8 U.S.C. § 1623. *Maine v. Thiboutot* (1980) 448 U.S. 1, 4, 8.

Moreover, there is little doubt that § 1623 creates the kinds of "rights, privileges, or immunities" enforceable under § 1983. The

Supreme Court has identified three factors to be examined in determining whether a particular statutory provision gives rise to such federal "rights":

> First, Congress must have intended that the provision in question benefit the plaintiff. . . . Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. . . . Third, the statute must unambiguously impose a binding obligation on the States.

Blessing v. Freestone (1997) 520 U.S. 329, 340-41.

All three factors indicate that § 1623 creates "rights" enforceable under § 1983. First, as explained above, the language of § 1623 indicates that Congress adopted the statute for the purpose of benefitting those (such as Appellants) who are U.S. citizens wishing to enroll in a public university outside their State of residence. Second, there is nothing "vague and amorphous" about § 1623's requirements: it proscribes any discrimination against such U.S. citizens *vis-a-vis* illegal aliens with respect to granting in-state tuition rates at colleges and universities. Third, the *binding* nature of the obligation imposed by Congress on the States is unambiguous: States are required to comply with § 1623 "[n]otwithstanding any other provision of law."

In sum, there is no reason to doubt the Court of Appeal's conclusion that Appellants should have their day in court. The Universities have waived their right to challenge the Court of Appeal's

conclusion that Appellants are entitled to private enforcement of federal preemption claims. If, despite that waiver, the Court were inclined to re-open the private enforcement issue, it should in fairness re-open the issue with respect to all counts of the complaint. And, as explained above, case law is clear that Appellants are entitled not only to private enforcement of their federal preemption claims, but also to private enforcement of their § 1983 claims and of their claims directly under § 1623.

CONCLUSION

Amici curiae respectfully request that the judgment of the Court of Appeal be affirmed.

Respectfully submitted,

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Counsel wish to thank Michael Rybak, a recent graduate of American University's Washington College of Law, for his assistance with the preparation of this brief.

CERTIFICATE OF COMPLIANCE

I, Richard Samp, hereby certify that pursuant to Rule 8.520(c)(1) of the California Rules of Court, the enclosed Brief of Washington Legal Foundation as *amicus curiae* in support of Respondents is produced using 13-point Roman type including footnotes and contains approximately 7,295 words. I rely on the word count of the computer program used to prepare this brief.

_____
Richard A. Samp

Dated: August 28, 2009

PROOF OF SERVICE

I am employed in Washington, District of Columbia. I am over the age of 18 and not a party to the within action. My business address is 2009 Massachusetts Ave., NW, Washington, DC 20036.

On August 28, 2009, I served the foregoing document described as **BRIEF OF U.S. REPRESENTATIVE LAMAR SMITH, *ET AL.*, AS *AMICI CURIAE*** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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